BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

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Date: August 19, 1998
Case No: 98-INA-00019

In the Matter of:

MC KOWSKI'S
Employer

On Behalf of:

Guillermo Barrera
Alien

Appearance: Susan Jeanette, Esq.
for the Employer and the Alien

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Guillermo Barrera ("Alien") filed by Employer McKowski's ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On September 7, 1994, the Employer filed an amended application for labor certification to enable the Alien to fill the position of supervisor in its janitorial service business.

The duties of the job offered were described as follows:

"The working schedule accommodates a half hour dinner break and two fifteen minute breaks. Supervisor of a janitorial service for large office and commercial accounts. Must be able to lead Spanish speaking workers who use industrial equipment and chemicals for cleaning these structures. Use and operate heavy duty buffer, rug shampooer, vacuum and wt/dry vacuum. Must speak English/Spanish."

A grade school education and 2 years experience in the job or the related job of "janitorial super" were required. Wages were $11.42 per hour. The applicant would supervise 6 employees and report to the Supervisor. (AF-24-125) 19 applicants were referred by the Job Service Office.

On August 8, 1996, the CO issued a NOF denying certification on several bases. The CO found Employer may have violated 20 CFR 656.21(b)(2)(i)(c) since the occupation of janitorial supervisor does not normally require a foreign language, and that Employer had not furnished evidence of a mostly Hispanic work force. Corrective action is demonstration of the job requirement as a reasonable relationship to the occupation and essential to the job duties. Secondly, the combination of duties of janitor/janitor supervisor must be justified under 20 CFR 656.21(b)(2)(ii). The CO, also, found that employer may have violated 20 C.F.R. 656.21(b)(1) in that the U.S. applicants were rejected for unlawful reasons, specifically naming them. The CO required documentation by employer that these applicants were not qualified, based on their failure to possess the requirements set forth on the ETA 750 Part A. The CO noted further that several efforts to interview were not timely. (AF-18-22)

Employer, August 15, 1996, forwarded its rebuttal, stating that it was "opting" to readvertise which would not include the

restrictive language requirement. Secondly, Employer contended the combination of duties of a supervisor and janitor was necessary since supervisors had to be knowledgeable and able to use the expensive cleaning equipment. Employer listed reasons for rejection of each applicant cited by the CO, which were mostly either lack of suitable communication skills in English, lack of two years supervisory experience, and in two cases, that the applicants were competitors who would go along under "..the guise of a crew, and begin soliciting (business) on their own.." (AF-11-17).

On November 14, 1996, the CO issued a Final Determination proposing to deny certification. The CO stated that even the proposed amended advertisement combines job duties unlawfully and that the failure to eliminate the language requirement from Box 13 leaves an unduly restrictive requirement. The CO specifically stated that nine of the applicants were unlawfully rejected: Crosswhite and Velasquez were not given job-related reasons for rejection; Acala and Villanueva were "competitors" was an unacceptable reason for rejection since they had given a desire to obtain the job; Pella and Briones had more than one year's supervisory service but were rejected because they didn't meet the two year requirement; Roman because he was not contacted until 72 days after his resume was sent; Flores because he didn't speak good English, yet his application showed considerable English acumen; Alvarez did respond to Employer's letter which he received the day after that set for interview, a situation not addressed by Employer. (AF-8-10)

On December 14, 1996, Employer filed a request for review and reconsideration of Final Determination. (AF-1-7)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent.,Inc. 87-INA-607 (1988). On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 88-INA-32. (April 5, 1989) Thus where a CO fails to address contentions raised by Employer on rebuttal, the CO may be reversed. Duarte Gallery, Inc., 88-INA-92 (October 11, 1989).

We believe the CO was correct in denying certification on the basis that a good faith effort was not made to recruit U.S. workers. At the outset we reiterate that 19 applicants were referred to Employer many of whom had apparently the background to warrant further interviews for a position that did not require great skills. Those applicants rejected for not communicating well in English were not documented. As cited by the CO, in at least one case, Employer's contentions were rebutted by the applicant's proficient use of English on his application. We further agree that failure to hire an applicant because (s)he was a competitor, is not here a valid basis for rejection. Similarly, the rejection of applicant Aldana because his knowledge of equipment was not good was not documented and would seem rebutted by his 9 years of janitorial experience. We need not address the issue of whether Employer's rejections of applicants with over one but less than two years experience is lawful, but note that it further tends to establish Employer's lack of good faith effort in recruitment. Merely because the CO may have cited incorrect grounds as a basis for denial in one or more instances, does not suggest that a CO's decision to deny certification should be vacated.

Employer has demonstrated that it has a valued employee in alien. This is not a basis for certification. Since we find the CO's decision is correct on the issues discussed above, we need not address the other issues raised.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge